

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

739

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23498

UNITED STATES OF AMERICA

v.

JESPERT E. MAYO

Appellant

On Appeal from Judgment of Conviction
of the United States District Court
for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit BRIEF FOR APPELLANT

FILED DEC 29 1969

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction of this appeal is vested in this Court by virtue of 28 U.S.C. §1291. On August 22, 1969, the United States District Court for the District of Columbia entered an Initial Judgment of Conviction of defendant upon his plea of

not guilty to a charge of assault with a deadly weapon and a verdict of guilty of said charge, from which judgment this appeal was taken.

STATEMENT OF ISSUES FOR REVIEW

1. The court below erred in refusing to exclude identification testimony which was based upon an out-of-court identification held in the absence of Counsel for the defendant, in violation of the defendant's right to due process of law accorded by the Fifth Amendment of the United States Constitution.

2. The court below erred in refusing to exclude identification testimony at trial, such testimony being based upon an out-of-court confrontation which was so unnecessarily suggestive and conducive to an irreparable mistaken identification as to constitute a denial of due process of law.

This matter has not previously been before this Court.

REFERENCE TO RULINGS

At pages 27-28 of the Trial Transcript, the trial judge orally denied defense counsel's motion to exclude identification testimony. Further, at pages 35-36 of the Trial Transcript, the trial judge overruled defense counsel's objection to the introduction of identification testimony.

STATEMENT OF THE CASE

On November 25, 1968, defendant-appellant, Jespert E. Mayo, was charged by indictment with violation Section 22-502, D. C. Code (Assault with a Dangerous Weapon). He was arraigned

on December 13, 1968, and entered a plea of not guilty. The jury trial of the matter commenced on June 11, 1969, and the jury returned a verdict of guilty of assault with a dangerous weapon on June 12, 1969 [Tr. 154-156]. A judgment of conviction was entered on August 22, 1969, and defendant was sentenced to an indeterminate term pursuant to the provisions of the Federal Youth Corrections Act, 18 U.S.C. §§ 5005 et seq.

The Government's case was based principally upon the identification by Paul R. Soules of the defendant, Jespert E. Mavo, as the assailant who stabbed him on October 2, 1968, at approximately 1:30 P.M. [Tr. 30]. Mr. Soules, on October 2, 1968, had driven to the home of a Mr. Womack at 330 53rd Street, Northeast, to collect an insurance account [Tr. 30]. As he left the Womack yard, two men came around the corner [Tr. 31]. They asked Mr. Soules for the time, and then one stepped up to Mr. Soules quickly, and as Mr. Soules turned towards him, he was stabbed [Tr. 32]. Immediately, the two assailants ran in different directions, and Mr. Soules ran back to Mr. Womack's house for assistance [Tr. 33].

Officer William L. Rull testified that he and Officer James E. Lukic came upon the scene of the crime in response to a police call [Tr. 54]. After obtaining a description of

the assailants from Mr. Soules, they cruised the area [Tr. 55, 56]. Upon seeing a man purporting to fit the description of one of the assailants, they gave chase in their scout car [Tr. 56, 57]. Subsequently, Officer Rull left the scout car and gave chase on foot, losing sight of the man in a wooded area near the 5600 block of Clay Place, Northeast [Tr. 57, 58]. Officer Rull searched the area for approximately five minutes and finally found a man hiding in a dog house behind 5606 Clay Place, Northeast [Tr. 58]. The man, Jespert Mayo, was escorted to the scout car and returned to the scene of the crime where Mr. Soules was asked if he could identify Mayo as one of the assailants.

After he had arisen on the morning of October 2, 1968, defendant left his home and proceeded by bus to downtown Washington to speak with his counselor, a Mr. James Robinson. After the conference, the defendant left to window shop and then returned to the general area of his home, taking the Seat Pleasant bus to Division Street, S. E. [Tr. 101-105]. Defendant there entered the Sheriff Liquor Store at Division Avenue and Grant Street, bought a pack of cigarettes, and left the store [Tr. 107-110].

Outside the store, defendant got into a fight with one Thomas Rogers and two of Rogers's friends near the

Sheriff Liquor Store -- the point of the argument being a debt owed to Rogers [Tr. 110, 119]. Defendant ran from Rogers and his friends and was chased by them through the creek and woods in the area near the liquor store [Tr. 110, 111]. Defendant hid in a dog house where he was found by the police and returned to the scout car on the street [Tr. 111, 112]. At that point, Rogers was on the street visible to the police. Mayo pointed to Rogers as the man he was running from, but the police paid no attention [Tr. 112]. Defendant was then brought back to 53rd Street, Southeast [Tr. 112], the scene of the assault.

Thomas Livingston Rogers corroborated Mayo's testimony, stating that a fight had occurred between himself and the defendant on October 2, 1968, near the liquor store and that the fight concerned an unpaid loan of three dollars loaned to defendant at the Knights of Columbus Youth Center at 10th and K Streets, N. W. [Tr. 130-133, 135-137]. Rogers identified his friends that participated in the fight as Thomas Cassidy and Don. Rogers testified that he and his friends chased the defendant, lost sight of him, and then saw him again when the police had the defendant in custody [Tr. 132, 134, 135].

Certain of the facts set forth above, as well as additional matters pertinent to this appeal, are discussed in greater detail in the Argument portion of this Brief, post.

ARGUMENT

It has been conclusively established that an out-of-court confrontation which is unreasonably suggestive and conducive to irreparable mistaken identification constitutes a denial of due process. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967); Hemphill v. United States, _____ U.S.App.D.C. _____, 402 F.2d 187 (No. 21,432, decided June 12, 1968). The prosecution may not rely upon an identification secured by such a means where the search for truth is made secondary to the quest for conviction. Palmer v. Pevton, 359 F.2d 199 (C.A. 4, 1966).

The facts pertaining to the instant identification reveal the unnecessarily suggestive nature of the identification of this defendant making such confrontation conducive to irreparable mistaken identification.

In the instant appeal, Paul Soules, the complaining witness, described his assailant as a light-skinned Negro about 5'9" or 5'10" tall, and weighing approximately 160 pounds [Tr. 35]. On the basis of this description, the police returned

with the defendant, who is 5'6" tall and weighs 125 pounds [Tr. 113]. Soules testified that he had been standing in the street for about twenty minutes while the police were looking for his assailant and that he was "kind of pale" and had "shock waves" going through him [Tr. 48].

Soules testified that the police made no attempt to remove the defendant from the scout car when they returned him to the scene of the crime, and that the identification was made while the defendant was seated in the back of the scout car, handcuffed with Officer Rull seated next to him and Officer Lukic in the driver's seat [Tr. 76-78]. Officer Lukic testified that Soules was asked by both officers whether the defendant was the man which had assaulted him, and that Mr. Soules answered "That's the man" [Tr. 91]. The defendant testified that indeed Mr. Soules had looked through the window, leaning on the scout car to do so, with his head resting on his arm, that the police requested an identification of him, but that Mr. Soules had stated "he wasn't sure" [Tr. 112].

The government never indicated why the police thought it unnecessary to remove the defendant from the scout car so that Soules could view the height, weight, clothes and general appearance of the defendant. Mr. Soules testified that he could

not judge a man's height and weight as well when he was sitting as when standing [Tr. 53]. This is especially important considering the discrepancy in the description of the size of the assailant originally given to the police and the actual size of the defendant.

What is most perplexing is that time was not of the essence in making the identification in the manner in which it was done. It is submitted that the confrontation at the scene of the crime rather than by formal line-up procedure was prejudicial. The circumstances are even more prejudicial because the only basis of conviction was the identification by Paul Soules, which identification was made on the basis of a mere glimpse of the assailant. The government never asserted that the fruits of any crime were discovered on the defendant or in the location where he was taken into custody. There was a knife found at the scene of the crime by Mr. Soules which he carefully picked up with the aid of his handkerchief and handed to Officer Lukic [Tr. 12, 82]. There was no attempt made to recover fingerprints [Tr. 62]. Later, he testified that it was standard Metropolitan Police practice to get fingerprints from a smooth surface, but that he did not submit the knife for analysis since he believed that "to obtain fingerprints off of that knife would have been impossible" [Tr. 86, 87]. Of course, analysis was impossible after the police had

removed the protecting handkerchief, fingered the knife and then initialed it.

The prejudicial nature of the initial confrontation and identification was perpetrated by the police when Soules drove in his car to the 14th Precinct and sat in the Precinct Report Writing Room with the defendant for an undetermined length of time [Tr. 81]. After this prolonged exposure to a single person, "the witness thereafter is apt to retain in his memory the image of the [suspect] rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification." Simmons v. United States, 390 U.S. 385, 88 S.Ct. 967 at 971 (1968).

It is clear that any request by the police for an identification confrontation has at least a subtle influence upon the witness by way of the suggestion that the police believe that the person to be identified is guilty. See United States v. Allen, No. 22,662 and 22,663 (U.S.App.D.C., Jan. 30, 1969). Where a suspect is brought before an injured witness, suffering from shock, and where the witness is in a police car manacled, the influence becomes overwhelming, rather than mere subtle.

Neither can it be argued that there was any necessity for the bypassing of procedures which would adequately have protected the rights of the appellant. The time of day was

1:30 p.m. and ample time was available for obtaining legal counsel and proper line-up procedures unlike the problems presented by the lateness of the hour in Bates v. U. S., 405 F.2d 1104 (C.A.D.C., 1968) or Russell v. U. S., No. 21,571 (D.C. Cir., Jan. 24, 1969). The witness was not in danger of dying or becoming permanently incapacitated such as the woman attacked in Hemphill v. United States, 402 F.2d 187 (D.C. Cir., 1968). There is no contention that the appellant could not have been arrested and held for a short time in the absence of the prejudicial "on the scene" identification. As then Judge Burger said in the Bates case:

"Prudent police work would confine these on the spot identifications to situations in which possible doubts as to identification need to be resolved promptly; absent such need the conventional line-up viewing is the appropriate procedure."

In addition to the absence of any circumstances compelling the suggestive "one man line-up", there is also a complete absence of those circumstances which would justify this procedure as being non-prejudicial, not overly suggestive, or more reliable. There had been no hot pursuit and constant eye contact present in Wise v. United States, 383 F.2d 206 (1968). There was no clear view of the attacker's face which would detract from the unreliability of the identification such as in Bates. Here the witness had only seen his attacker "out of the corner of my eye." [Tr. 31].

The suspect was not even taken out of the police vehicle and allowed to stand in front of the witness as the true assailant had done.

There can be no question of the inappropriateness of an on the spot identification in this case. The suggestiveness of the events, when combined with the exposure of the complaining witness to the person of the suspect-appellant at the police station leads to the serious doubts as to the reliability of the initial identification, and consequently, of the tainted in-court identification. Before deprivation appellant's constitutional rights to counsel at a critical stage of the proceedings and to due process of law can be held to be harmless error, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. See Chapman v. California, 386 U. S. 18

Applying the test inquiries propounded by the District Court in United States v. Clark, No. 605-66 (D.C.D.C., June 17, 1968), approved by this court in Clark v. United States, No. 21,001 (Dec. 6, 1968, D.C. Cir.) at 23-24, it must be concluded that Soules' identification of Mayo was violative of due process:

- "1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the

confrontation so as to negate the assertion that he was shown alone to the witness?"

Mayo was alone except for the police officers.

"2. Where did the confrontation take place?"

The confrontation took place with Mayo manacled in the rear seat of a police scout car.

"3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?"

The police had ample time and opportunity to secure a line-up.

"4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?"

According to the testimony of Officer Lukic, the witness was called over and asked specifically whether Mayo was the assailant, thereby indicating the police officer's belief that they had caught the assailant.

"5. Were any tangible objects related to the offense placed before the witness that would encourage identification?"

The knife used in the cutting was on the scene and defendant was manacled.

"6. Was the witness' identification based on only part of the suspect's total personality?"

The witness identified the defendant without seeing him standing or walking. The witness had only a brief glimpse of his attacker and an incomplete view of the defendant. Witness's description of the assailant was substantially different from a correct description of Mayo except for the rather common articles of clothing.

- "7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing the suspect?"

There is no evidence on this point.

- "8. Was the emotional state of the witness such as to preclude objective identification?"

The witness was bleeding, alarmed, dizzy, and in a state of mild shock. He was quite susceptible to the suggestive nature of the confrontation.

- "9. Were any statements made to the witness prior to the identification indicating to him that the police were sure of the suspect's guilt?"

The witness was asked "Is this the man?" There is no evidence as to whether the witness was told about the circumstances of the chase and apprehension.

- "10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on less than a positive basis?"

Clearly, the witness' observation of the assailant was limited to a brief glance, out of the corner of his eye and he had no positive basis upon which to make an identification.

Looking to the "totality of the circumstances," it is clear that "the confrontation conducted * * * was so unnecessarily suggestive and conducive to irreparable mistaken identification

that [the defendant] was denied due process of law." Stovall v. Denno, supra, at 302; see also, Hemphill v. United States, supra, at 192; Clemons v. United States, 408 F.2d 1230, cert. denied, 394 U.S. 964 (1969).

It must also be noted that the due process rights of the defendant were further violated in that he was deprived of his right to counsel at the pretrial confrontation between the defendant and the prosecuting witness, Soules. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967). Nor does the fact that the confrontation was held within a hour after the assault detract from the defendant's right to counsel pursuant to the facts of this case. In Russell v. United States, ____ U.S.App.D.C. ____, ____ F.2d ____ (No. 21,571, Jan. 21, 1969). This court held that the comprehensive language in Wade did not apply to on the scene identifications occurring moments after the commission of the offense. However, this court also noted in Mason v. United States, ____ U.S.App. D.C. ____, ____ F.2d ____ (No. 21,818, June 30, 1969) that the fear that a delay to obtain counsel for a line-up involving a suspect found near the scene of the crime and moments afterwards might detract from the reliability of a very fresh identification and might also result in unnecessary detention of an innocent suspect. Further, in the Mason case, this court indicated

(at Slip Opinion, p. 4) that the conclusion reached in Russell is founded upon these compelling countervailing policy considerations militating against delaying identification confrontations in those circumstances.

These countervailing considerations could not present problems of any consequence in the instant case. Within minutes after the prejudicial confrontation, both the defendant and the prosecuting witness faced each other again at the 14th Precinct. The assault, the arrest and the prejudicial confrontation all took place in the early afternoon of a Wednesday when counsel would have been readily attainable. Given these factors, it is submitted that the delay in the time for the confrontation would in no way detract from the reliability of said identification because that delay would not have involved more than one hour. To the contrary, it would appear the compelling considerations in this matter must rest with the defendant's right to due process rather than the considerations set forth in the Russell case. Clearly, these constitutionally guaranteed rights could have been protected by holding a fair and non-prejudicial line-up in the presence of counsel, which would in no way have detracted from the reliability of the ensuing identification.

CONCLUSION

For all the reasons stated above, it is submitted that the Judgment of Conviction entered against the defendant by the District Court be reversed and the charges against him dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was mailed, postage prepaid, this 23rd day of December, 1969, to the United States Attorney, United States Courthouse, 3rd and Constitution Avenue, N. W., Washington, D. C. 20001.

David A. Rabin

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

Appellant has based his appeal on the contention that identification testimony should have been excluded by the trial court. Appellant's brief set forth at length the factual circumstances of the identification confrontation to demonstrate that the confrontation as conducted by the Metropolitan Police denied appellant his Sixth Amendment

right to counsel and was so unnecessarily suggestive as to constitute a denial of appellant's Fifth Amendment right to due process of law. The Government argues that considerations of effective and intelligent law enforcement must outweigh the due process considerations arising from the facts of this case. Defendant contends that the facts reveal a gross abuse of defendant's right to due process and is a classic example of the type of confrontation which is likely to lead to mistaken identification. It was precisely this likelihood of such mistaken identification which led the Supreme Court to its holdings in United States v. Wade, 388 U.S. 218 (1967) and Stovall v. Denno, 388 U.S. 293 (1967).

The Government seeks to support its position by asserting that Mr. Soules, the identifying witness, (1) had sufficient time to carefully observe his assailants, (2) was able to give a detailed and accurate description of the assailants to the police, (3) made a reliable identification when defendant was presented to him, and (4) made this identification less than twenty minutes after the stabbing.

1. Time to Observe. Mr. Soules's testimony was that as he walked from the Womack house to 53rd Street, he saw his assailants from the corner of his eye as they walked towards 53rd Street from Clay Place, a side street, and rounded the corner to meet him in front of the Womack house

on 53rd Street. As Mr. Soules said on direct examination: "I just noticed this out of the corner of my eye, and I didn't pay no attention to it" [Tr. 31]. While Mr. Soules did testify that, at the time he met his assailants, they were in front of him, this direct confrontation could only have been for the time it took Mr. Soules to step from the gate of the Womack house to the center of the street for, as he testified, he walked between them and as he answered the question posed by the assailants, he turned towards the right as one of the assailants stabbed him [Tr. 32]. The foregoing indicates that Mr. Soules could only have obtained a momentary glimpse of his assailants, rather than an extended confrontation, as the Government's brief would suggest.

2. Detailed and Accurate Description. The Government contends that this confrontation resulted in a detailed and accurate description of the assailants. The description, as set forth in the Government's brief, is of an individual of average physical proportions, wearing a blue shirt and black pants [Tr. 35]. There are no unusual physical characteristics or clothes which would distinguish the assailant from numerous other individuals. But beyond that, there is the uncontroverted error of the description in that Mr. Soules described the assailant as being "about five feet nine or ten" and weighing "about 160 pounds"

[Tr. 35] when the defendant actually is five feet six inches tall and weighs 125 pounds [Tr. 113]. The Government, at page 5 of its brief, states that "when arrested, defendant was dressed in a blue shirt, black pants, and had a growth of hair on his chin." This unremarkable description of an individual is evidently what the Government relies upon since there is no similarity between the assailant and the defendant as to weight and height and since the police never presented the defendant to Mr. Soules in a standing position so that Mr. Soules would have the opportunity to judge their physical characteristics.

In fact, the accuracy of Mr. Soules's description of the clothing of his assailant is open to serious question on the basis of his description of the other assailant. At the preliminary hearing before Judge Howard on October 3, 1968, the day after the commission of the crime charged, Officer Rull was asked how Mr. Soules described the other assailant and gave the following answer: "He described him as a Negro male, approximately nineteen years old, with a yellow shirt and green pants" [Preliminary Hearing Tr. 9].

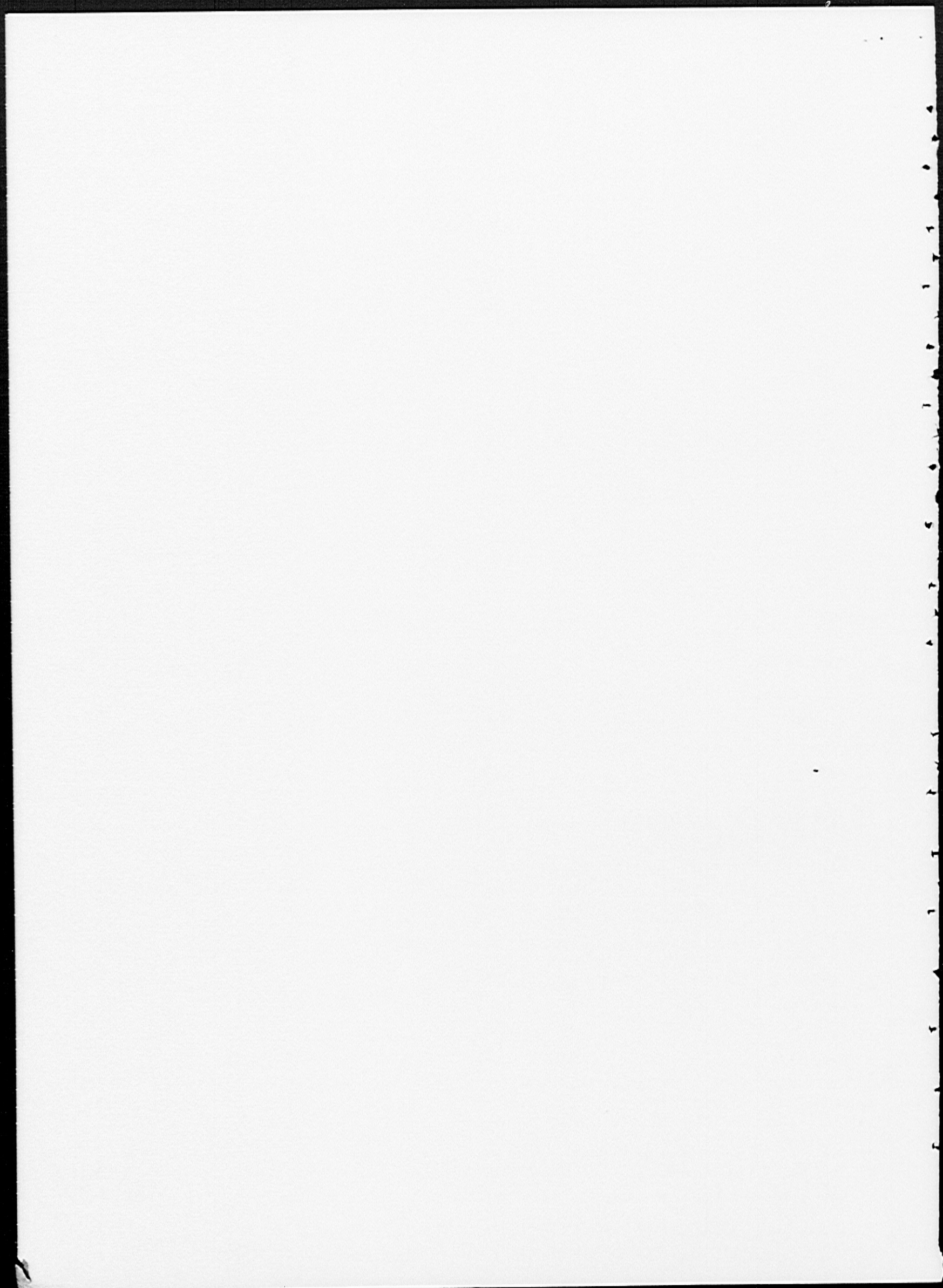
At trial, Mr. Soules, on Government's direct examination, was asked to give a description of the other assailant and responded as follows: "And the other one had on, I think it was, an orange shirt, a pair of light blue pants" [Tr. 22].

Finally, as to the goatee, the last element of the Government's so-called "detailed description," defendant admitted he had some hair growth on his chin, but not to the extent that it could be called even a thin goatee [Tr. 114]. Further, Mr. Soules never gave any indication that the assailant who stabbed him had a mustache. Defendant testified that he had a mustache in early October, 1968, which he had to shave off at the Youth Center, and this statement was never controverted by the Government [Tr. 114].

3. Reliable Identification. The Government gratuitously comments, in its brief, without any basis in the record, that Mr. Soules would not have remained on the scene if his physical or mental condition had been seriously impaired. To the contrary, common sense would dictate that a man who was in shock or who felt "sort of like shock waves were going under me" as Mr. Soules testified [Tr. 48] would have been incapable of evaluating his need for medical care. Further, it is submitted that such condition of shock, which the witness described, would certainly preclude a reliable identification.

4. Time. The Government's brief initially poses the issue presented as involving an on-the-scene identification "minutes after the offense." That brief later recites that "appellant was arrested less than twenty minutes after

the stabbing." On the other hand, Officer Rull testified that approximately twenty-five minutes had elapsed from the time he received the description of the assailants from Mr. Soules and the time he returned to Mr. Soules with the defendant in custody [Tr. 9]. The elapsed time between the stabbing and the giving of the description by Soules encompassed several additional minutes. A radio call went out, Officer Lukic heard the call while Officer Rull was in a restaurant located on Division Avenue, N. E. Officer Lukic waited for Officer Rull to complete the purchase of some sandwiches in the restaurant, and, when he returned, proceeded to the scene of the crime [Tr. 149, 150]. The foregoing manifestly demonstrates that substantially more than twenty minutes elapsed from the time of the stabbing to the confrontation. While it is perhaps not logical to cut off the admissibility of an on-the-scene identification at any set number of minutes after the commission of a crime, the court in Russell v. United States, 133 U.S. App. D.C. 77, 408 F.2d 1280, cert. denied, 395 U.S. 928 (1969), stressed that its holding is limited to identifications occurring "within minutes of the witnessed crime [408 F.2d at 1284, f.n. 20]. It is submitted that the instant confrontation, occurring not less than thirty minutes after the crime, does not fall within the holding in Russell, supra.



In summary, the defendant contends that the momentary viewing time afforded to the complaining witness of his assailant, the discrepancies in the identification testimony which was abetted by the "look-in-the-patrol-car" viewing of the defendant while the complaining witness was suffering the shock of having been stabbed, taken together should result in the exclusion of the identification testimony. Appellant therefore contends that in this particular case, prompt confrontation was neither reasonable nor necessary, and that there is no valid excuse for not conducting the normal pretrial confrontation by line-up with the accompanying protections to due process which such proceeding would afford. Thus, the confrontation in the instant case was such as to deprive defendant of his right to counsel and rights to due process of law as afforded by Amendments Five and Six of the Constitution of the United States of America. Accordingly, the court erred in admitting identification testimony.

For these reasons, it is submitted that the judgment of conviction entered against the defendant must be reversed.

Respectfully submitted,

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